Filed 3/20/09 Marriage of Heron CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of SUSAN and JACK LEE HERRON.	G039285
SUSAN HERRON, Appellant, v. JACK LEE HERRON, Respondent.	(Super. Ct. No. 96D008953) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Nancy A. Pollard, Judge. Reversed and remanded with directions.

Susan Herron, in pro per.; and Francis L. Diaz for Appellant.

Law Offices of Steven E. Briggs and Steven E. Briggs for Respondent.

Appellant Susan Herron (Susan) appeals from an order denying her motion to set aside a stipulated judgment entered between her and her ex-husband, respondent Jack Lee Herron (Jack).[1] The court wrongly found her fraud claim was time-barred. No substantial evidence showed Susan knew or should have known of Jack's alleged fraud more than one year before she filed her motion. We reverse.

FACTS

Jack and Susan stipulated to entry of a judgment in November 2000 resolving certain community property issues in their dissolution.

Jack, Susan, and her mother were later embroiled in separate litigation over a real estate deal (the real estate case).[2] In May 2001, counsel for Susan's mother subpoenaed loan documents from Jack's bank. One of the documents stated, "A February 29, 2000 personal finance statement for Jack Herron reflects a net worth of $5,045,000 . . . ."

Counsel for Susan's mother in the real estate case filed a joint exhibit list on behalf of both Susan and her mother in April 2002.[3] The joint exhibit list included the subpoenaed loan document.

Jack testified about the loan document at the trial in the real estate case on September 26, 2002. Susan's counsel asked Jack about his ability in 2000 to repay a loan to Susan's mother. He asked Jack whether the loan document's statement he had a

---

1 We use first names for clarity, intending no disrespect.

2 (See *Herron v. Herron* (Jun. 28, 2005, G031860) [nonpub. opn.].)

3 Susan's real estate counsel is not the same lawyer representing her in this appeal or the underlying dissolution action.

$5 million net worth in February 2000 was accurate. Jack replied, "At the time it was submitted it probably was."

Less than one year later, on September 22, 2003, Susan informed the court she intended to file a motion to set aside the stipulated judgment. She asked the court to stay the one-year limitations period on setting aside a family law judgment for fraud or perjury to give the parties time to negotiate a settlement. (Fam. Code, § 2122, subds. (a), (b).)[4] Jack's counsel stated, "It's our position that that statute has long since elapsed. So I'm reluctant to do anything that would cause it to be revived." The court asked, "Can we have a condition that if for some reason the court finds the statute has not expired . . . that you'll give [Susan] a 45-day [stay] conditioned on the fact that there's a finding the statute hasn't run?" Jack's counsel reiterated, "As long as the court makes clear in the record that it's our position that it's already run." The court replied, "I understand that," and asked, "But could we stipulate that if there is a finding that, in fact, [the limitations period] ha[d] not run, that there will be a stipulation for a 45-day stay so we can get the global settlement?" Jack's counsel answered, "Fine."

The court issued a minute order granting "A 45 DAY STAY, ***CONDITIONED*** ON A FINDING THAT THE STATUTE OF LIMITATIONS HAS ***NOT*** RUN. [JACK'S] COUNSEL BELIEVES IT HAS RUN." The court extended the stay on identical terms, apparently with the parties' consent, until February 2004.[5]

---

[4] All further statutory references are to the Family Code unless otherwise stated.

[5] A November 3, 2003 minute order states, "Both counsel on the phone at the same time agree that current orders remain in full force and effect — that the stay will remain in effect to the next hearing" on December 18, 2003. A minute order for the December 2003 status conference shows the parties discussed the stay with the court. The court re-imposed the stay, and the status conference was continued to February 11, 2004.

Susan filed her set-aside motion on February 9, 2004. Susan supported her motion with declarations from herself and her counsel in the real estate case. In her declaration, Susan attested Jack did not disclose his $5 million net worth in 2000 to her before the November 2000 stipulated judgment, she would not have consented to the stipulated judgment had she known Jack's true 2000 net worth, and she first discovered his true 2000 net worth during his trial testimony in the real estate case. In his declaration, Susan's real estate counsel stated she "expressed surprise to [him] expressing her shock to learn for the first time on September 26, 2002 that Jack had a net worth of five million dollars in the spring of 2000."

The court granted Susan's request for an evidentiary hearing, but also granted Jack's request to bifurcate the hearing. It ruled the hearing would be limited to the timeliness of Susan's set-aside motion. After the hearing, the court denied the motion.

DISCUSSION

Susan contends the court wrongly found her set-aside motion was untimely. The Family Code provides that a motion to set aside a judgment for actual fraud "shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud." (§ 2122, subd. (a).) A motion to set aside for perjury is subject to a similar one-year time bar. (§ 2122, subd. (b).) "[T]he statute of limitations under section 2122 accrues as of the date the plaintiff either discovered or should have discovered *the facts constituting the fraud or perjury*, not the date the plaintiff began to suspect the fraud or perjury." (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1149.) Susan claims no substantial evidence showed she knew or should have known about the loan document before September 2002, when she

admittedly learned about it during Jack's real estate case testimony.[6]

Jack offers three counterarguments. None have merit.

First, Jack seeks to charge Susan with her real estate counsel's earlier knowledge of the loan document, relying on the general rule that "what her attorneys knew [Susan] knew." (*O'Brien v. Markham* (1940) 37 Cal.App.2d 381, 391.) Jack notes Susan's real estate counsel subpoenaed those loan documents in May 2001 on behalf of Susan's mother, and began representing Susan in the real estate case no later than April 2002, when he prepared the joint exhibit list. Jack concludes the real estate counsel's knowledge of the loan documents should be imputed to Susan as of April 2002. Thus, Jack claims, the one-year limitations period expired in April 2003, five months before the court stayed it in September 2003.

Jack overstates the general rule imputing Susan's counsel's knowledge to her. Susan can be held to know only what her real estate counsel "knows and should communicate to [her]." (*Lazzarevich v. Lazzarevich* (1952) 39 Cal.2d 48, 50; accord Civ. Code, § 2332 [principal deemed to know whatever agent knows "and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the [principal]"].) Jack fails to show Susan's real estate counsel had any duty to inform her about the loan document or its report of Jack's 2000 net worth. Her counsel's examination of Jack at trial suggests the loan document was relevant to showing Jack's ability to repay a purported loan from Susan's mother. Jack does not explain how this line of questioning affected Susan, or why her counsel should have dissected the related exhibits with Susan. Nor does Jack set forth any general obligation of Susan's real estate counsel to keep her

---

[6] Jack notes the court generally found Susan not credible, but this is not affirmative evidence Susan knew Jack's true 2000 net worth before September 2002. "[T]he disregard or disbelief of the testimony of a witness is not affirmative evidence of a contrary conclusion. [Citations.] In other words, the fact that the trier of fact does not credit a witness's testimony does not entitle it to adopt an opposite version of the facts which otherwise lacks evidentiary support." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205.)

apprised of all facts potentially relevant to the unrelated dissolution action, in which that counsel was not representing her. Contrary to Jack's overbroad claim, Susan cannot be charged with knowledge of every fact contained in every document obtained during discovery by her counsel.

Second, Jack contends Susan had direct, personal knowledge of the loan document. He relies upon his real estate counsel's testimony at the bifurcated hearing. His real estate counsel testified that Susan's real estate counsel had told him during that litigation that Susan had helped gather and assemble the trial exhibits. Jack notes this testimony was "uncontroverted." Perhaps. But Susan correctly objected to it as inadmissible hearsay and lacking personal knowledge. The court overruled Susan's objection, apparently accepting Jack's assertion the testimony was admissible because Susan's counsel was her agent. To be sure, the hearsay statements of a party's agent are admissible if the party authorized the agent to make the statements on the party's behalf. (Evid. Code, § 1222.) Jack offered no evidence Susan had authorized her real estate counsel to share her role in assembling trial exhibits with Jack's real estate counsel. The testimony of Jack's real estate counsel is thus inadmissible hearsay. And the counsel conceded he had no personal knowledge Susan ever saw the loan document or reviewed it with her counsel.

Jack further relies upon a declaration Susan filed in this action in June 2001. In that declaration, Susan identifies seven real estate properties sold or offered for sale by Jack or his company, including the properties' addresses and asking prices. Jack implies Susan must have gathered this information from the loan document, which her real estate counsel had subpoenaed in May 2001. But nothing supports this conclusion. Susan did not obtain the property addresses from the loan document. She already had that information. All seven properties were identified by address in the November 2000 stipulated judgment. Nor did Susan obtain the sales prices from the loan document — it does not contain them. It shows five of the projects were still under development, and

construction had not even started on two of them. Jack points to nothing in Susan's declaration which she could have obtained, and only obtained, from the loan document.

Third, Jack contends that even if Susan's motion would have been timely in September 2003, the court lacked jurisdiction to stay the limitations period to February 2004. Certainly, the court could not do so unilaterally. """[T]he fixing of time limits within which particular rights must be asserted is a matter of legislative policy the nullification of which is not a judicial prerogative.""" (*Kuperman v. San Diego County Assessment Appeals Bd. No. 1* (2006) 137 Cal.App.4th 918, 931.) But the court did not act unilaterally. It sought and received Jack's consent to stay the limitations period if it had not already expired — and it had not, as explained above. Jack does not question his own authority to do so. (Cf. *Holdgrafer v. Unocal Corp*. (2008) 160 Cal.App.4th 907, 925 [defendant estopped to invoke the statute of limitations where there has been """some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action"""].)

Finally, Jack sets aside the timeliness issue and contends the court rightly denied the set-aside motion on the merits. He notes the loan document was admitted into evidence at the hearing by stipulation, for the limited purpose of showing when it was in the possession of Susan's real estate counsel. He claims its report of Jack's $5 million net worth in 2000 is unauthenticated, inadmissible hearsay. That may be so — but only at this time.

Jack overlooks the court bifurcated the hearing at his request to address only the timeliness issue. Jack asserted this limitation whenever Susan tried to reach the merits of her fraud claim. Notably, Jack's counsel objected when Susan's counsel asked Jack whether he had seen the loan document before and whether he did, in fact, have a $5 million net worth in 2000. The court sustained the objection: "[T]he whole question is, when did [Susan] discover [the loan document]? And that kind of questioning that you just asked him as to whether the contents of it are accurate or not, does not go to the

timeline." Susan was not allowed to establish the admissibility of the loan document or generally offer evidence showing the merits of her fraud claim. She will have the chance to prove her claim on remand.[7]

DISPOSITION

The postjudgment order is reversed. The matter is remanded with directions for the court to vacate its order denying Susan's set-aside motion and hold an evidentiary hearing to decide the motion on its merits. Susan shall recover her costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.

[7] Susan wrongly contends the court erred by denying her request for a statement of decision. No statement is required when the court denies a motion. (*In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040.)